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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

IANN LEWIS McDONALD,

Defendant and Appellant.

A136827

(Sonoma County
Super. Ct. No. SCR617900)

Less than 48 hours after being released from state prison, defendant Iann Lewis McDonald was the subject of a parolee search that found him in constructive possession of a firearm and ammunition forbidden to him. He entered pleas of no contest to felony charges of being a past-convicted felon in possession of a firearm and ammunition. (Pen. Code, §§ 29800, subd. (a)(1), 30305, subd. (a)(1).) He also admitted the truth of enhancement allegations that he had a prior serious or violent conviction that qualified under the Three Strikes law (Pen. Code, § 1170.12), and that he had served a term in state prison. (Pen. Code, § 667.5.)

At sentencing, the trial court denied defendant's motion to dismiss the strike enhancement in accordance with *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), and sentenced him to state prison for a total term of two years and eight months. The term was computed as the low term of 16 months on the firearm charge, and then doubled pursuant to the Three Strikes law. An identical term for the ammunition charge was imposed, but ordered to run concurrently. The one-year term for the prior prison term was stayed.

On this timely appeal, defendant presents two claims of error respecting only the sentencing. The first is that he is entitled to six additional days of custody credit, for a total of 135 days, pursuant to Penal Code section 4019. This the Attorney General concedes is correct. Although defendant initially asked for six additional days of presentence custody credits, he accedes to the Attorney General's argument that these credits are not owed. We will order preparation of a new abstract of judgment to reflect this modification.

Another modification is necessary solely because of the Attorney General, who notes that "although appellant has not raised the issue, it appears the trial court improperly stayed, rather than struck, the prior prison term enhancement. (Pen. Code, § 667.5, subd. (b).) The trial court has no authority to stay a Penal Code section 667.5, subdivision (b) enhancement. The prior prison term enhancement is 'mandatory unless stricken.' (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) Because the record seems to indicate the trial court intended to give appellant a lenient sentence and did not wish to add an additional year to appellant's sentence, this Court may choose to order that the abstract be amended to strike imposition of the one-year section 667.5, subdivision (b) enhancement." We shall do so.

Defendant's primary contention is that the trial court abused its discretion when it denied his *Romero* motion. Although appointed counsel labors heroically to persuade us, we must reject his contention. Although we are not unsympathetic to defendant's arguments, the hurdles he must surmount are daunting.

Our Supreme Court has held that "a court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*)). The court went on to explain just what this means in application:

"In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing

objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” ’ [Citation.] Second, a ‘ “decision will not be reversed on appeal merely because reasonable people might disagree. ‘An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.’ ” ’ [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.

“Because ‘all discretionary authority is contextual’ [citation], we cannot determine whether a trial court has acted irrationally or arbitrarily in refusing to strike a prior conviction allegation without considering the legal principles and policies that should have guided the court’s actions. We therefore begin by examining the three strikes law.

“ ‘[T]he Three Strikes initiative, as well as the legislative act embodying its terms, was intended to restrict courts’ discretion in sentencing repeat offenders.’ [Citation.] To achieve this end, ‘the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court “conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme.” ’ [Citation.]

“Consistent with the language of and the legislative intent behind the three strikes law, we have established stringent standards that sentencing courts must follow in order to find such an exception. ‘[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, . . . or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.’ [Citation.]

“Thus, the three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.

“In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation]. Moreover, ‘the sentencing norms [established by the Three Strikes law may, as a matter of law,] produce [] an “arbitrary, capricious or patently absurd” result’ under the specific facts of a particular case. [Citation.]

“But ‘[i]t is not enough to show that reasonable minds might disagree about whether to strike one or more prior conviction allegations. [Citation] Where the record is silent [citation], or ‘[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance [citation].’ Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary. Of course, in such an extraordinary case—where the relevant factors . . . manifestly support the striking of a prior conviction and no reasonable minds could differ—the failure to strike would constitute an abuse of discretion.” (*Carmony, supra*, 33 Cal.4th 367, 376-378.)

Defendant’s criminal history is not extensive but neither is it trivial. In January of 2010, two weeks before his 20th birthday, defendant was convicted of felony vandalism (Pen. Code, § 594) and active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a).) He was admitted to three years probation. He violated the terms of

his probation twice. The first time, less than two months later, was for possession of gang paraphernalia. He managed to go the next 16 months without incident until he was arrested for another criminal offense, at which point probation was terminated. That offense led to defendant's conviction in August 2011 for what appears to be attempting to flee from a pursuing peace officer while driving in a wanton disregard of persons and property (Pen. Code, § 664; Veh. Code, § 2800.2, subd. (a)). This conviction resulted in a 16-month state prison sentence. It was just after being paroled from that sentence that defendant was arrested for the current offenses.

The record is clear that the court was receptive to defendant's argument that the manifestation of overt criminal culpability on his part was not overwhelming. It is hardly a surprise that defendant reiterates his heaviest emphasis on this point. As he presents it, and this is not factually disputed, he had just been released from prison, he not unnaturally went to the home of a relative, in this case his brother. It was his bad luck that when the parolee search was conducted, the officers discovered that "in his brother's bedroom was a legally owned and registered rifle [actually, it was a shotgun]—locked in a wood and glass cabinet—along with ammunition." In anticipation of his release, "his family had scoured *his* room, removing any scintilla of 'red' [reflecting gang affiliation] from *his* bedroom, from clothing to pictures to cigarette lighters. How they casually dismissed the presence of a rifle in his brother's bedroom," defendant submitted to the trial court, indicated "more a lack of common sense" from "a family that lacks any real sophistication" rather than "an affront or defiance of the terms of probation by Mr. McDonald." (*Italics added.*) And defendant never even went into his brother's bedroom.

Reference has already been made to the Attorney General's characterization of the trial court's intent to impose "a lenient sentence," short of granting defendant's motion. This appears to be a correct estimation. At the time he changed his pleas, defendant was advised that the "potential exposure is eight years and four months in the state prison." At sentencing, the court rejected the probation officer's for a five-year sentence. The court selected the lowest term for the firearm charge, knowing that it would be doubled.

It ran the sentence on the ammunition charge concurrent to the term on the firearm charge. And, thanks to the Attorney General, sentence on the prior prison term enhancement, even though stayed, will be stricken in the trial court's name. But this leniency now works against defendant because the sentence actually imposed "is also a relevant consideration when deciding whether to strike a prior conviction; in fact, it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences." (*People v. Garcia* (1999) 20 Cal.4th 490, 500.) Having already made substantial reductions in defendant's potential aggregate term, the trial court could conclude that reducing that term to only 16 months was simply too much leniency.

Calling it "almost heartbreaking," the trial court nevertheless found itself unable to "make a determination that Mr. McDonald falls outside the scheme of three strikes." That decision has a strong presumption supporting its correctness. (*Carmony, supra*, 33 Cal.4th 367, 378.) The trial court was clearly advised of defendant's "background, character, and prospects." (*Id.* at p. 377.) Defendant does not contend that the trial court was unaware of its discretion or "considered impermissible factors" (*id.* at p. 378), only that the court attached "unreasonable significance" to the short period of time between his release and his reoffending. Yet it cannot be denied that defendant's performance on probation for his first offenses was poor. Moreover, regardless of the circumstances, and making all allowance for his family's best intention, defendant no sooner gets out of prison than he breaks one of the iron laws governing parolees—stay away from guns.

Can the sentence of 32 months qualify as an abuse of discretion so " 'arbitrary, capricious or patently absurd' " that no reasonable person could agree with it? (*Carmony, supra*, 33 Cal.4th 367, 377, 378.) Not in our view.

The judgment of conviction is affirmed. The clerk of the superior court is directed to prepare a new abstract reflecting that defendant is awarded 135 days of actual custody credits pursuant to Penal Code section 4019, and that the one-year enhancement pursuant to Penal Code section 667.5 is stricken. The clerk is further directed to forward a certified copy of the new abstract to the Department of Corrections and Rehabilitation.

Richman, J.

We concur:

Haerle, Acting P.J.

Lambden, J.